Supreme Court, U.S.
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No. 98-659

In The

Supreme Court of the United States

October Term, 1998

EMMA LEE PAUL,

Petitioner,

vs.

WILLIAM MORROW and COMPANY, INC., CBS INC., and SIMON & SCHUSTER, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review the Eleventh Circuit's decision affirming a summary judgment against Petitioner on her copyright claims on a record which showed there was no basis on which a jury could find either (1) actual copying of Petitioner's work or (2) access to Petitioner's work and substantial similarity between Petitioner's work and Respondents' works.

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STATEMENT PURSUANT TO RULE 29.6 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents hereby list the following parent companies:

Viacom Inc. is the parent company of Simon & Schuster, Inc.

The Hearst Corporation is the parent company of William Morrow and Company, Inc.

CBS Corporation is the parent company of CBS Inc.

Respondents do not have any nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

Petitioner Emma Lee Paul ("Ms. Paul") seeks review of the Eleventh Circuit's affirmance of a district court order granting Respondents' motion for summary judgment in Ms. Paul's copyright infringement suit against them. Ms. Paul claimed Respondent William Morrow and Company's book, *Alex Haley's Queen* (the "Book"), Respondent CBS's Broadcast of the mini-series of the same name (the "Broadcast"), and Respondent Simon & Schuster's audio version of the Book (the "Audiotapes") infringed on Ms. Paul's copyright of her unpublished manuscript, *The Bold Truth*. On forms provided by the district court, Ms. Paul provided the court and Respondents with all of her proof concerning Respondents' alleged infringement. (Pet., p. 44a). The district court granted Respondents' motion for summary judgment and entered final judgment dismissing the complaint with prejudice. (Petition for Writ of Certiorari ("Pet.") at 43a-46a). Ms. Paul did not present any evidence indicating there was direct copying of her work by Respondents. The district court held (1) there was no showing Respondents had access to Petitioner's work, and (2) no showing of substantial similarity between Petitioner's work and Respondents' works. The Eleventh Circuit affirmed, holding (1) Ms. Paul was no longer even contending Respondents had directly copied portions of *The Bold Truth*, and (2) Ms. Paul could not meet the "two-part test for indirect copying. She fails to meet that test because the record does not permit the inference that the defendants had access to her work. All the record establishes is that Ms.

Paul submitted her manuscript to Doubleday, it does not establish – either through direct or circumstantial evidence – that Doubleday passed the manuscript on to Haley, and that he, in turn, passed it on to the defendants." (Pet. at 6a).

B. Statement of the Facts

Emma Lee Paul authored an autobiographical manuscript entitled *The Bold Truth* prior to April 1, 1976 and secured a Certificate of Registration of this work. The Broadcast, the Book, and the Audiotape of *Alex Haley's Queen* trace the story of Alex Haley's paternal family from slavery to the birth of Alex Haley's father in the late nineteenth century.

David Stevens wrote the entire teleplay of the Broadcast, completing it on or about the middle of 1992, without ever having possessed or read *The Bold Truth*. (Pet. at 31a-33a). After writing the teleplay of the Broadcast, Stevens wrote the Book, also without ever having possessed or read *The Bold Truth*. *Id*. Mr. Stevens never saw, possessed or read *The Bold Truth* and, in fact, knows of that work only by virtue of the allegations made by Ms. Paul in her complaint. *Id*. The Audiotape is an audiotape of the Book.

Ms. Paul filed with the district court interrogatory answers from another lawsuit (Alex Haley, who died prior to the commencement of this lawsuit, was a defendant), and these sworn interrogatory answers indicate that Mr. Haley, like Mr. Stevens, never read or saw *The Bold Truth*. (Pet. at 45a, 67a). There is no evidence in the record indicating Mr. Stevens, Morrow, CBS, or Simon & Schuster, prior to this lawsuit, had access to *The Bold*

Truth, which has never been published or publicly sold or distributed. (Pet. at 45a, 6a.)

None of the four works at issue is before the Court, but the district court summarized the works as follows:

> The works at issue recount the experiences of black Americans growing up in the American South, especially their relationships with white Americans. As such, the Bold Truth and the Defendants works use many of the same phrases, words, and colloquial expressions commonly used by Southern white and black Americans during the time period represented. But the similarities between The Bold Truth and the defendants works ends with the general Southern back drop. The plot, themes, sequence of events, and mood of the works are markedly different. Briefly, Alex Haley's Queen is a dark, pessimistic account of the racism suffered by a light-complected black woman. It is an historical and metaphorical depiction of several generations of black American slaves, former slaves, and their descendants. The protagonists experience with white Americans is one of slavery, rape, murder, violence, and mistreatment. The Bold Truth, on the other, is an anecdotal autobiography of the Plaintiff's life from the 1930's to the 1970's. An optimistic, uplifting story, it recounts the positive relationships the author, a dark-complected black woman, has had with the white Americans she has come into contact with during her life. In contrast to Alex Haley's Queen, it is not marked by conflict or tragedy. In short, the two works bear little resemblance, and there is no basis for finding that the two works are substantially similar.

(Pet. at 44a-45a).

ARGUMENT

A. Certiorari Should Be Denied Where, As Here, Review Is Sought Of A Court Of Appeals' Decision Which Turns Solely On An Analysis Of The Particular Facts Of This Case, And The Court Of Appeals' Analysis Agrees With The District Court's.

Ms. Paul does not seek review because the Eleventh Circuit applied the wrong law or misapplied the law. Ms. Paul seeks review because she believes the Eleventh Circuit, like the district court before it, misconstrued the facts in the record. Certiorari is particularly inappropriate in such a case. "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). At best, Ms. Paul asserts a factual dispute – she disagrees with what the two lower courts found to be the undisputed facts in the record. This Court is a court of law, not a court for the review and correction of misapprehension of facts by district courts and circuit courts. Review is especially inappropriate where, as here, the determination of the undisputed facts by the district court was concurred in by the Eleventh Circuit. As this Court noted in an analogous situation, this Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

B. The Eleventh Circuit Did Not Err In Affirming The District Court's Entry Of Summary Judgment Where There Was No Evidence Sufficient For A Jury To Find Access By Respondents To Petitioner's Work.

A claim for copyright infringement requires proof by the plaintiff of ownership of the copyright in a particular work, and the copying of a substantial, legally protectable portion of that work, and where it is shown that a plaintiff cannot present such evidence, summary judgment is appropriate. *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 459 (11th Cir. 1994) ("To establish copyright infringement, two elements must be proven: ownership of a valid copyright, and copying of constituent elements of the work that are original."). Because plaintiffs can rarely adduce direct evidence of copying, courts have developed a two-pronged, circumstantial test to determine whether copying of a plaintiff's work has taken place. In this circuit, once it is established that there has been no direct copying, "plaintiff is first required to show that defendant had access to the plaintiff's work. . . . " *Beal, supra*, 20 F.3d at 459; *see Mitek Holdings, Inc. v. ARCE Engineering Co.*, 89 F.3d 1548 (11th Cir. 1996). "[S]econd, the plaintiff must show that the defendant's work is substantially similar to the plaintiff's protected expression." *Beal*, 20 F.3d at 459. *Howard v. Sterchi*, 974 F.2d 1272 (11th Cir. 1992). The Eleventh Circuit did not reach the second issue, substantial similarity, because it found the record to be clear, as did the district court, that Ms. Paul had wholly failed to present evidence from which a jury could conclude Respondents had access to Ms. Paul's work.

The record includes a declaration by David Stevens attesting to the fact that he, the author of Respondents' works, had no access to Ms. Paul or her book when Stevens wrote what he did. Mr. Stevens was not deposed, and no evidence was presented contradicting his testimony. The record also includes copies of interrogatory answers that Ms. Paul herself provided to the district court in which Mr. Haley denied having such access. There was no other evidence relating to Respondents' access. The record is clear. No Respondent had any access to Ms. Paul or her work prior to the filing of this lawsuit.

C. There Was No Evidence Of Substantial Similarity Of Protectable Expression Between Defendants' Works And *The Bold Truth*.

Although the Eleventh Circuit did not reach the issue of substantial similarity, it is apparent even from Ms. Paul's petition that "no reasonable jury upon proper instruction would find that the two works are substantially similar." *Beal, supra,* 20 F.3d at 459. In addressing this issue, the Courts generally use what is called an "extrinsic" test, which involves a comparison of specific, objective criteria of two works – some combination of plot, theme, dialogue, mood, setting, pace, characters and sequence of events. *See, e.g., Beal, supra,* 20 F.3d at 460. Applying this test, it is clear there is no substantial similarity.

a. Plot and Theme

(1) *The Bold Truth*

Ms. Paul's book is an autobiography of a 20th century African-American woman whose experience with white Americans in the South is uniformly positive. The central focus of *The Bold Truth* is the goodness of most white Southerners with whom Ms. Paul and her family interacted while she was growing up. Ms. Paul uses her and her family's struggle to make a living from various occupations – ranging from farm work, to hourly labor to door-to-door peddling of fruits and vegetables – as a back drop for stories concerning good, white Southerners. "So this book is about the good white folks I have come in contact with in my lifetime." One of the only acknowledgments of racism toward Ms. Paul in *The Bold Truth* concerns Ms. Paul's view of white **Northerners** *after* she and her family moved to the North.

Ms. Paul also repeatedly states in her book that she never personally witnessed the kind of prejudice associated with Jim Crow laws, the Ku Klux Klan, and violence against African-Americans that was commonplace in the south while she was growing up there, and that her contact with white Southerners was almost uniformly positive.

(2) *Alex Haley's Queen*

The central theme in *Alex Haley's Queen* involves the inequities of a young, African-American woman's life during and shortly after slavery. In contrast to Ms. Paul's upbeat, optimistic view of relations between whites and

blacks (itself totally at odds with all historical reports), reading or listening to *Alex Haley's Queen* leaves one concluding that racism against former slaves is a ubiquitous, if not the only theme of the Book, the Broadcast and the Audiotapes.

b. Setting and Sequence Of Events

(1) *The Bold Truth*

The sequence of events for *The Bold Truth*, with minor exceptions, is that of an anecdotal chronological autobiography of Ms. Paul's life from the 1930's to the 1970's. Excluding events in the north, the setting is a southern United States unrecorded by any historical account or treatise, a south in which no African-Americans are mistreated by white Americans.

(2) *Alex Haley's Queen*

The sequence of events for *Alex Haley's Queen*, is an historical account of the treatment of African-American women during and immediately after the abolition of slavery. It ends before Ms. Paul's book begins. And the events in the Book, Broadcast and Audiotapes are portrayed as historical and metaphorical, not simply the events in the life of one person. The setting, aside from the first third of the Book and the beginning of the Audiotapes, which take place in Ireland and the northern United States, is a south wholly different from the fairy-tale south described in Ms. Paul's book. Queen's experience with whites in the south was one of slavery, rape, murder, violence, oppression, and mistreatment, in stark

contrast to Ms. Paul's experience, which was one of freedom, fairness, and friendship.

c. Mood

(1) *The Bold Truth*

The Bold Truth is optimistic in mood, not only concerning relations among the races but in terms of the economic struggle of the impoverished. *The Bold Truth* denies the existence in Ms. Paul's life of racism by white Southerners and even suggests Ms. Paul's family survived at times because of gratuitous help given to her family by various white Southerners. *The Bold Truth* almost from beginning to end is a success story, by which Ms. Paul attempts to dispel misconceptions about racism and the plight of African-Americans in the American south of the early and mid-twentieth century.

(2) *Alex Haley's Queen*

The mood of *Alex Haley's Queen* is predominantly pessimistic. Throughout the Book, Broadcast and Audiotapes, Queen struggles with problems flowing from her race and the prejudices of white Southerners. Queen even encounters racism among other African-Americans based on her light complexion. The prejudice, violence, and hatred which dominate Queen's life create a dark, serious mood. Even at the end of the Book, when Queen has found love and has raised two boys, Queen is institutionalized for a mental breakdown. Certainly by the last page one is not left hopeless – the last page reports that Queen's son Simon did receive an education and live a

much better economic life than his mother, but the 670 preceding pages reveal a mood that has the author, David Stevens, grieving over the circumstances he describes in the Book he wrote.

d. Characterization

Ms. Paul's evidence of similarity between the characters of the different works was the listing of names common to the Book and her book. The record contains no evidence whatsoever with regard to the Broadcast or Audiotapes. And there simply is no similarity in characterization. With regard to the common names, each is a common English name for a man or a woman, and none of the characters with the common names bears any similarity. The differences in characterization are also pointed up by the differences between the main characters and the treatment of whites generally. The lead characters in both stories are African-American women. However, this is where the similarity between these characters ends. In the Book, Queen is a light-complected daughter of a slave master. In *The Bold Truth,* the protagonist is a dark-complected daughter of an African-American minister. The two lead characters have widely differing outlooks and experiences, especially concerning interactions with white people, and share no common experiences related even to their respective (non-protectable) struggles to survive and raise their families. Finally, there is a stark difference between the works at issue in the treatment of the white characters by the authors. In *Alex Haley's Queen,* the white characters are almost uniformly negatively portrayed. Nearly without exception,

these characters hold overtly racist views and act in discriminatory manners. In *The Bold Truth,* Ms. Paul describes the white characters as generally kind. In fact, Ms. Paul writes of racism only by way of second-hand accounts, contending throughout the work that she never actually witnessed incidents of racism or injustice directed at African-Americans by whites.

e. Dialogue

There is no evidence in the record identifying dialogue which is common to Ms. Paul's work and Respondents', and in any event, the dialogue of the two works differs greatly, in no small part because Ms. Paul's book was written by a person of limited education and Respondents' works were written by a professional writer. Because the works are so drastically different in all respects, the words spoken by the various characters in the two stories also differ. Although required to do so by the district court, Ms. Paul did not point to a single protectable similarity between the dialogues of the works. And there is none.

CONCLUSION

For these reasons, the petition should be denied.

Respectfully submitted,

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